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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

See
~~NO.~~ 77-595

U. S. INDUSTRIES, INC.,
~~Petitioner~~
Respondent

v.

JOHN D. PAGE and DON THOMAS,
~~Respondents~~
Petitioner

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. 77-595

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JOHN D. PAGE and DON THOMAS,
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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, John D. Page and Don Thomas, respectfully pray that a writ of certiorari issue to review the decision entered on July 25, 1977 by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The orders of the United States District Court for the Southern District of Texas are reprinted in Appendix A, Appendix B, Appendix C and Appendix D of Petitioner's Petition for Writ of Certiorari. The opinion of the Court of Appeals for the Fifth Circuit is reported

at 556 F.2d 336 and is reprinted in Appendix E of Petitioner's petition. The judgment of the Fifth Circuit is reprinted in Appendix F and the Notice of Order on the Petition for Rehearing is reprinted in Appendix G of Petitioner's Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals herein was entered on July 25, 1977. Petitioner's Petition for Rehearing was denied on September 13, 1977. This Cross-Petition for Writ of Certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the decision of this Court in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), holding that the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964 does not toll the running of the period of limitations applicable to an action under 42 U.S.C. §1981, should be applied retroactively.

STATEMENT OF THE CASE

Respondent John D. Page filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") on April 23, 1969 alleging that Petitioner had discriminated against him because of his race. On May 21, 1974 the EEOC issued a "Notice of Right to Sue" form to Respondent's attorney, and on August 14, 1974 the Complaint initiating this cause of

action was filed. The Complaint alleged that Respondents were entitled to recovery on the basis of two statutes—Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* (hereinafter "Title VII"), and 42 U.S.C. §1981 (hereinafter "§1981").

On June 16, 1975 the District Court dismissed Respondents' §1981 cause of action with respect to any alleged illegal acts which occurred more than two years prior to the filing of the Complaint (Appendix A of Petition, p. 15). On Respondents' Motion to Reconsider on October 8, 1975, the District Court reinstated Respondents' §1981 claim and held that this Court's decision in *Johnson v. Railway Express Agency, Inc., supra,* should not be given retroactive effect (Appendix B of Petition, p. 17). On June 4, 1976 the District Court denied Petitioner's Motion to Reconsider and reaffirmed its previous holding that *Johnson* should not apply retroactively (Appendix C of Petition, p. 20). Thereafter, on June 30, 1976, the District Court certified the issue for an interlocutory appeal (Appendix D of Petition).

The Fifth Circuit, on July 25, 1977, reversed the District Court with respect to Respondents' §1981 cause of action holding that *Johnson* is to be given retroactive effect and that accordingly the §1981 claim must be dismissed insofar as it relates to any acts alleged to have occurred more than two years before the filing of suit in federal court (Appendix E of Petition, p. 41).

REASONS FOR GRANTING THE WRIT

In *Johnson v. Railway Express Agency, Inc.*, this Court held that the filing of a Title VII claim with the EEOC does not toll the limitation period within which to file

a civil action under §1981. Prior to that decision the United States Courts of Appeals were split on the issue. The Fifth Circuit and the District of Columbia Circuit had unequivocally held that the statute of limitations for the §1981 claim would be tolled by the filing of the EEOC charge. *See Guerra v. Manchester Terminal Corporation,* 498 F.2d 641, 648 (5th Cir. 1974); *Macklin v. Spector Freight Systems, Inc.,* 478 F.2d 979, 994-96 (D.C. Cir. 1973); *Boudreaux v. Baton Rouge Marine Contracting Company,* 437 F.2d 1011, 1017 (5th Cir. 1971). The District Court for the Eastern District of Virginia had aligned itself with the Fifth Circuit and the D.C. Circuit on this question. *Reynolds v. Daily Press, Inc.,* 5 EPD ¶7991 (E.D. Va. 1972). On the other hand, the Sixth Circuit had adopted the opposing view that the filing of the EEOC charge did not toll the limitations period for the filing of a §1981 cause of action. *Johnson v. Railway Express Agency,* 489 F.2d 525 (6th Cir. 1973). The District Court for Delaware supported the Sixth Circuit's holding. *Jenkins v. General Motors Corp.,* 354 F. Supp. 1040 (D. Del. 1973).

In addition to the question of the tolling of the limitatons periods for a §1981 claim, there was much confusion in the lower courts, prior to this Court's decision in *Johnson,* as to whether §1981 gives rise to a cause of action separate and apart from a Title VII cause of action. The Seventh Circuit, in *Waters v. Wisconsin Steel Wks. of Internat'l Harvester Co.,* 427 F.2d 476, 487 (7th Cir. 1970), *cert. denied,* 400 U.S. 911 (1971), had held that a plaintiff could only sue directly under §1981 if he showed a reasonable excuse for failing to exhaust EEOC remedies. The District Court for Colorado dismissed §1981 suits in which the plaintiff was unable

to show that relief was first sought from the EEOC. *Allen v. Pipefitters, Local 208,* 4 FEP 1229 (D. Colo. 1972; *Taylor v. Safeway Stores, Inc.,* 333 F. Supp. 83, *rev'd in part,* 524 F.2d 263 (10th Cir. 1975).

This Court's decision in *Johnson* was one of great importance in defining the relationship between §1981 and Title VII. However, because of the number of plaintiffs who have justifiably relied on these pre-*Johnson* holdings by lower federal courts, the issue of whether *Johnson* should have retroactive effect is of equal importance. As stated above the pre-*Johnson* precedent in the Fifth Circuit and the District of Columbia Circuit was clear that a plaintiff's §1981 cause of action would not be considered untimely if the plaintiff filed a charge with the EEOC and waited until some action had been taken by the EEOC before bringing a court suit. Plaintiffs within the Seventh Circuit could not even file a §1981 suit until they had first exhausted Title VII administrative proceedings. *Waters, supra.* The question of retroactive application of *Johnson,* affects the many plaintiffs who filed combined §1981 and Title VII suits in these jurisdictions. In estimating the number of persons affected by this question, it must be remembered that many of these plaintiffs, like Respondents, seek to represent not only themselves but others similarly situated and accordingly have filed their suits as class actions.

In giving *Johnson* retroactive effect in the instant case the Fifth Circuit relied on its previous holding in *Williams v. Phil Rich Fan Mfg. Co., Inc.,* 552 F.2d 596 (5th Cir. 1977) (Appendix E of Petition, p. 41). The Fifth Circuit's decision in *Phil Rich Fan* was based on an incorrect application of the criteria established by this Court to

analyze whether or not retroactive effect should be given to a newly announced judicial rule.

This Court has established three criteria to be used in any in-depth analysis of an issue of retroactivity. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-7 (1971): (a) whether a new principle of law was established, "either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . ." *Chevron, supra* at 106; (b) whether retrospective operation will further or retard the purpose of the rule, *Chevron, supra* at 107; and (c) whether substantial inequitable results would follow if the new rule is applied retroactively. *Id.*

In *Phil Rich Fan*, the Fifth Circuit cited the above criteria but failed to apply them correctly. As to the first criteria, the Fifth Circuit found that, at least as to the previous law of that circuit, *Johnson* had established a new principle of law and had overruled "clear past precedent." *Phil Rich Fan, supra* at 599. The Fifth Circuit then added its own twist to the *Chevron* criteria. Citing its previous opinion in *Matter of S/S Helena*, 529 F.2d 744 (5th Cir. 1976), the Court stated that "in deciding whether civil rules should be applied retroactively we think that the purpose of the rule should be given greater weight than the extent to which the parties relied on the law that existed before that rule was announced." *Phil Rich Fan, supra* at 600. Nowhere has this Court indicated that the *Chevron* criteria are to be accorded different rather than equal weight in deciding a retroactivity issue. The Fifth Circuit then found that one purpose of the no-tolling *Johnson* rule

is to bar stale claims (as it is in every case involving a statute of limitations). Applying its *own* conclusion that the purpose of the new rule of law criteria should be given the most weight, the Fifth Circuit then quickly concluded that *Johnson* should be given retroactive effect without giving any significant consideration to the two remaining *Chevron* criteria. This constituted an erroneous application of the *Chevron* decision.

Clearly, a more sensible and correct application of the *Chevron* criteria was accomplished by the District Court for the Southern District of Texas in *Bush v. Wood Brothers Transfer, Inc.*, 398 F. Supp. 1030 (S.D. Tex. 1975). The District Court in *Bush* concluded, as did the Fifth Circuit that the first *Chevron* criteria was satisfied by *Johnson*. *Johnson* overturned clear precedent and was a case of first impression. However, thereafter, the District Court recognized that the purpose of *Johnson* was not merely to bar stale claims but to encourage plaintiffs to use every avenue of relief.[1] *Bush, supra* at 1032. A retrospective application of *Johnson* which will bar many §1981 causes of action will thus thwart a significant purpose of *Johnson* by closing an avenue of relief to plaintiffs who justifiably relied on previous law. As for the third criteria, it cannot be denied that extreme inequity will result from a retroactive application of *Johnson* since neither Respondents nor other plaintiffs could have foreseen this shift in the law.

Thus, in *Bush*, the District Court, correctly applying the criteria established by this Court, reached a con-

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1. The Tenth Circuit has also recognized that a primary purpose of *Johnson* was to establish §1981 as distinct and independent from Title VII. See *Taylor v. Safeway Stores Incorporated*, 526 F.2d 263, 274 (10th Cir. 1975).

clusion opposite to that of the Fifth Circuit and held that *Johnson* should not be applied retroactively. The Court of Appeals was in error holding otherwise and in dismissing Respondents' §1981 cause of action. The issue of retroactivity faced by this Court in *Chevron* also dealt with a statute of limitations application. *Chevron* decided, for the first time, that state law, rather than federal law determines the timeliness of actions arising from injuries occurring on fixed structures on the Outer Continental Shelf. Although one purpose of all limitations periods is to bar stale claims and any prospective application of a new limitations rule would thwart such a purpose, this Court in *Chevron* recognized that another overriding purpose was involved. In that case, a primary purpose in using state law "was to aid injured employees by affording them comprehensive and familiar remedies." *Chevron, supra* at 107-08. Such a purpose would clearly have been thwarted by applying the new periods of limitations rule retroactively so this Court held that it was to apply prospectively.

An analogous situation appears in the instant case. A primary underlying purpose of this Court's *Johnson* holding was to establish §1981 as a remedial route in employment discrimination cases separate and independent from Title VII. However, just as a retroactive application in *Chevron* would have thwarted a basic purpose of that new rule, a retroactive application of *Johnson* thwarts the purpose of establishing §1981 as an independent cause of action. The indepedence of §1981 is not merely a procedural independence from the EEOC prerequisites attached to Title VII. The remedies available under Title VII, at least as to seniority relief, have

been limited by a statutory provision in Title VII. See *International Brotherhood of Teamsters v. United States*, ____U.S.____, 97 S.Ct. 1843 (1977). The remedies under §1981 in this area have not been so limited. *Johnson's* no tolling rule should not be applied retroactively so as to deny Respondents, and other plaintiffs, an independent cause of action under §1981 with attendant independent remedies.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned authority, hereby certify that on this _____ day of December, 1977, three (3) copies of the foregoing Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon all counsel of record, below listed, by depositing same in the United States Mail, postage prepaid.

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